ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996	)	
	)	CC Docket No. 96-238
Amendment of Rules Governing Procedures	)	
to Be Followed When Formal Complaints	)	
Are Filed Against Common Carriers	)	

COMMENTS OF BELL ATLANTIC[1] ON PROPOSED ACCELERATED PROCEDURES

I. Introduction and Summary

The Public Notice released by the Common Carrier Bureau asks for comments on two issues, (1) whether an accelerated "minitrial" procedure should be adopted for use in some formal complaint cases and, if so, what types of cases, and (2) what procedures should be followed in any cases that use such a fast track process.[2] As to the first issue, while all complaint proceedings should certainly be resolved as promptly as possible consistent with protecting the due process rights of the parties, it is not clear that there is any need for further accelerated

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

[2] "Common Carrier Bureau Seeks Comment Regarding Accelerated Docket For Complaint Proceedings," ***Public Notice***, DA 97-2178 (rel. Dec. 12, 1997) ("Public Notice"). Of course, consistent with the Administrative Procedure Act, if any new procedures is to be formally adopted and mandated, the Bureau would need to undertake a rulemaking proceeding in which it specifies the proposed rules.

procedures, given the new radically altered rules for prosecuting formal complaints that are designed to resolve complaints within the accelerated statutory deadlines added in the 1996 Act. It is also not clear what types of complaints a fast track procedure could be used for. While the Public Notice suggests that it could be used for "competition" issues, Congress has assigned complaints relating to the implementation and enforcement of the local interconnection provisions of the 1996 Act to the state commissions.

As to the second issue, the procedures that should be followed, a more effective way to resolve issues on a fast track would be to establish an accelerated Alternative Dispute Resolution ("ADR") process that would be considered at the initial stage of the complaint process. To the extent the Bureau adopts any fast track procedure, however, it should be invoked only where both parties agree that the issues raised are susceptible to being handled on this basis. And the Commission should make clear that any findings that result from the accelerated procedures relate only to the particular dispute before it and have no preclusive or precedential effect in other proceedings that may be filed in other forums based on other statutes.

II. Another New Set of Formal Complaint Procedures Is Not Needed.

A. *The Newly-Adopted Complaint Rules Are Already Designed To Meet Statutory Deadlines.*

Less than two months ago, the Commission released a set of comprehensive new rules streamlining the formal complaint process to allow it to resolve complaints within the already short deadlines established in the 1996 Telecommunications Act.[3] Before the new rules even appeared in the ***Federal Register***,[4] however, the Bureau released the instant Public Notice suggesting that it is considering yet another set of even more compressed procedures largely to replace the new rules for some types of complaint cases. The proposed procedures could apparently be prescribed on an case-by-case basis by the Task Force or the Bureau, either at the request of a party or ***sua sponte.*** Public Notice at 5.

When it adopted the new rules, the Commission expressed its intent "to closely monitor the effectiveness of our new streamlined rules in promoting the pro-competitive goals of the Act." Report and Order at ¶ 4. Rather than doing so, however, the Notice here appears either to ignore the new rules or simply to assume that the new rules do not fill the bill.[5] In reality, the new complaint rules will already force a major change in the manner in which parties

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[3] ***Report and Order***, FCC 97-396 (rel. Nov. 25, 1997).

[4] A summary of the Report and Order appeared in the ***Federal Register*** on January 7, 1998, 63 Fed. Reg. 989, and the new rules will become effective seventy days later, on March 18, 1998.

[5] Although the accelerated procedures contemplated in the Public Notice appear to be more accelerated than those in the new rules, the Bureau makes no finding as to why a more accelerated timetable is needed. It only says, without further explanation, that the Bureau has been evaluating "whether the needs of some industry participants better could be met" by more accelerated procedures. Public Notice at 2.

litigate formal complaints and are designed to resolve complaints in an extremely compressed timeframe. They require, among other new streamlined procedures, (1) pre-filing contact and consideration of settlement, (2) significantly reduced deadlines on all filings (e.g., answers due within 20 days of the date the complaint was filed and replies, where allowed, within another three days), (3) limited discovery within a compressed timetable, (3) a joint stipulation of disputed and non-disputed facts and legal principles to be filed within eight business days after the answer is filed, (4) the increased potential for injunctive relief, and (5) possible referral of some issues to an administrative law judge. All of these are intended to insure that the case is ripe for decision well within the three-to-five month deadlines in the Act. These rules will increase the burdens placed on the parties and require them to carry the increased load under significantly reduced deadlines.

Neither the industry nor the Commission has had any experience with the new streamlined complaint rules. Until they have operated under those rules for some period, it is simply not clear that there any need for yet another set of new, detailed procedures for use in some unspecified subset of formal complaint proceedings. On the contrary, establishing a second set of procedures is more likely to generate confusion about which procedures will be applied to any particular complaint. Such confusion will detract from efforts to implement the new rules that already have been adopted to meet the substantially reduced decisional deadlines that Congress has established. Instead of forcing parties carriers to cope with two parallel sets of procedures, the Bureau should give parties an opportunity to operate under a single set of new rules and to suggest any needed changes. If the new rules prove effective in allowing the Commission to meet the statutory deadlines, an accelerated docket would be unnecessary. If they fall short, experience under the new rules should help the Commission to determine what

changes are needed, at which time it could consider whether adoption of additional accelerated procedures would be more effective.

B. *Complaints Addressing Local Interconnection Issues May Not Properly Be Raised at the FCC.*

The Notice suggests that any fast track procedures could be used for complaints that raise "issues of competition in the provision of telecommunications services." Public Notice at 3. Any issues relating to competition for interstate services, however, are already subject to the streamlined complaint procedures that were only recently adopted. As discussed above, as to these issues it is not clear that there is any need for still another set of accelerated procedures.

In addition, to the extent parties here interpret the reference to "competition" issues to encompass local competition, those matters are beyond the Commission's jurisdiction to address. As the Eighth Circuit has squarely held, complaints based on the local interconnection provisions of the 1996 Act, or based on agreements entered into under the terms of those provisions, are subject to the exclusive jurisdiction of state commissions. According to the court, "nothing in the Act even suggests that the FCC has the authority to enforce the terms of negotiated or arbitrated agreements or the general provisions of Sections 251 and 252." ***Iowa Util. Bd. v F.C.C.***, 120 F.3d 753, 804 (8th Cir. 1997). In particular, "the FCC's authority under section 208 does not enable the Commission to review state commission determinations or to enforce the terms of Interconnection agreements under the Act." ***Id.*** at 803. Clearly, any fast track procedures that may ultimately be adopted cannot be invoked to adjudicate local competition matters over which the Commission has no authority.

C. *Rather Than Impose a Second Set of Formal Complaint Procedures. A Voluntary Alternative Dispute Resolution Process Would Complement the Complaint Procedures Already Adopted.*

The Bureau asks for suggestions and recommendations as to how the Commission and state commissions could work cooperatively to ensure that the interests of both are protected. Public Notice at 3.[6] Rather than using a set of pre-subscribed procedures, the parties and representatives of the respective commissions should attempt to develop a single mutually-agreeable alternative dispute resolution ("ADR") process to resolve all of the overlapping issues. Use of such voluntary procedures would be in the interests of all participants. There would be only one proceeding, using procedures to which all parties have agreed in advance. A successful ADR process would avoid the need for adjudication of the dispute at either the state or the Commission and would avoid the possibility of inconsistent findings. Accordingly, even though use of ADR would be voluntary, it can be expected that the parties' interests in avoiding duplicate adjudication would be sufficiently strong that they would agree to use of such procedures in most cases of split jurisdiction.

III. Use of The Proposed Accelerated Docket Should Be Strictly Voluntary.

To the extent that the Bureau chooses to adopt new accelerated docket procedures, they should be invoked only with the consent of all parties to a complaint proceeding. Many courts, both state and federal, have adopted fast track procedures to expedite decision. These procedures may involve assigning a case to a magistrate, expedited briefing, and scheduling early

[6] Federal and state interests might be raised, for example, where a complainant addresses both federal and state issues in its complaint or files separate complaints before the Commission and at the state involving the same set of facts but different services.

oral argument.[7] They are invoked, however, only where all parties agree, because they may truncate discovery, give parties less time than is normally the case for briefing or preparation for oral argument, or otherwise modify normal court procedures.

The proposed accelerated docket, with expedited oral examination of company personnel in an expedited minitrial format, likewise would deprive parties of some of the procedural rights and preparatory time that they would have under the formal complaint rules. It could also give opportunities for parties to "game" the complaint process for political or competitive advantage, by proposing use of the accelerated procedures in the most complex cases, knowing that the defendant would be afforded insufficient time to prepare an adequate defense. Use of accelerated procedures in those instances could also raise questions of due process. Accordingly, in order to protect fully the interests of the parties, the proposed procedures should be used only with the consent of all parties.

In addition, even if voluntary, minitrials should be only a last resort if other means of resolving disputes fail. The Bureau suggests that the parties should have to engage in early settlement discussions under the auspices of the Task Force before the accelerated procedures may be invoked. Public Notice at 5. If the case cannot be settled, the Bureau should require that the discussions be expanded to include use of the ADR process discussed above as an alternative to the formal complaint rules. If the parties can agree to an ADR process, that process should move forward under the time limitations under the Act (unless the parties waive the statutory deadlines). The proposed minitrial procedures would be invoked, on a voluntary basis, only if

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[7] ***See, e.g.,*** Fed. R. App. P. 2 ("In the interest of expediting decision, ... a court of appeals may ... suspend the requirements or provisions of any of the [ ] rules in a particular case ... and may order proceedings in accordance with its direction."). Many Federal District Courts have invoked similar voluntary procedures in particular cases to expedite their resolution.

the parties cannot settle or agree to an ADR procedure and choose not to proceed under the procedures in Commission's rules.[8]

Moreover, because of the highly truncated nature of the proposed accelerated docket, its use, whether or not voluntary, should be under the condition that findings of fact are limited to the particular proceeding and should not be given preclusive effect in other proceedings that may be brought in other forums based on other statutes.[9] The limited time to prepare for a minitrial, including the short time to prepare witnesses, could make it difficult for parties, particularly defendants, to present their strongest case.[10] While some form of expedited procedures may help the Commission meet the short statutory deadlines established in the 1996

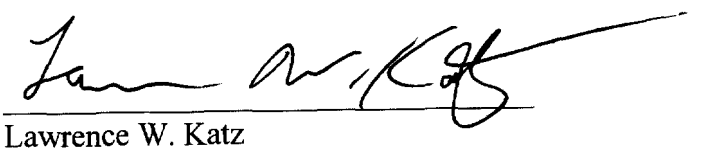
[8] If all of the parties are unable to agree to use of either an ADR process or the minitrial procedure, the complaint should be adjudicated under the newly-adopted rules.

[9] Of course, if the procedures were voluntary, the possibility that the decision would be given preclusive effect could blunt the parties' incentive to participate.

[10] Complainants have control over the time they file and could prepare themselves for the trial before they submit their complaint.

Act, they should not preclude a party from presenting a ***de novo*** factual case if the same issues are raised in a separate proceeding in another forum.

Respectfully Submitted,



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January 12, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 1998 a copy of "Comments of Bell Atlantic on Proposed Accelerated Procedures" was served by hand on the parties on the attached list.

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